JOHN F. DAVIS, CLERK

No. 996

In the

Supreme Court of the United States

OCTOBER TERM, 1966

BROWNWOOD MANUFACTURING COMPANY
and
GILLSAM MANUFACTURING COMPANY, INC.,
Petitioners,

v.

TANENBAUM TEXTILE COMPANY, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS

HAROLD B. BERMAN,
1831 Republic National
Bank Bldg.,
Dallas, Texas, 75201,

EMIL CORENBLETH,
1831 Republic National
Bank Bldg.,
Dallas, Texas, 75201,
Attorneys for Petitioners.

WARLICK PRESS, INC.—2263 VALDINA STREET—DALLAS—ME 1-3130

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BROWNWOOD MANUFACTURING COMPANY and GILLSAM MANUFACTURING COMPANY, INC., Petitioners, pray that a writ of certiorari issue to review the judgment of the Court of Civil Appeals for the Fifth Supreme Judicial District at Dallas, Texas, entered in the above-entitled case. Petitioners' application for a writ of error to the Supreme Court of Texas, to review said judgment of the Court of Civil Appeals, was refused on October

5, 1966, and a motion for a rehearing on said application was overruled on November 2, 1966. Petitioners have exhausted all appeals available to them in the Texas Courts.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Civil Appeals for the Fifth Supreme Judicial District in Dallas, Texas, printed in Appendix A hereto, *infra*, pp. A-1 to A-8, is reported in 404 S.W. 2nd 106. The Supreme Court of Texas, in refusing the Petitioners' application for a writ of error, did not render an opinion, but refused the same with the notation "Refused, No Reversible Error".

JURISDICTION

The judgment of the Court of Civil Appeals for the Fifth Supreme Judicial District at Dallas, Texas, was rendered on May 20, 1966. R. Sec. C, p. 1; Appendix A, *infra*. Petitioners' motion for a rehearing in said Court was overruled on June 17, 1966. R. Sec. D, p. 27. An application for a writ of error was filed with the Supreme Court of Texas and was refused on October 5, 1966. R. Sec. E, p. 48. A motion for rehearing in the Supreme Court of Texas was overruled on November 2, 1966. R. Sec. E, p. 48. The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1257(3), because the Petitioners have been deprived of a right to due process claimed under the Constitution of the United States.

QUESTION PRESENTED

Is the guarantee of the Fourteenth Amendment, providing for the protection of due process of law, violated by the rendition of a judgment *in personam* against non-resident corporate defendants upon whom no personal service, actual or constructive (as provided by law), had been made, other than service upon an unauthorized agent, and then in such a manner which did not provide said non-resident corporate defendants adequate notice of the suit or sufficient time to prepare defenses and appear?

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional provision involved is Section 1 of the Fourteenth Amendment to the Constitution of the United States, which is as follows:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The "due process" clause of said amendment is the portion thereof which is concerned with this petition.

STATEMENT AND HOW FEDERAL QUESTION WAS PRESENTED

Respondent initiated a cause of action in the 160th Judicial District Court of Dallas County, Texas, on July 17, 1964,

alleging that it had acquired a judgment *in personam* against the Petitioners on April 23, 1964, in the Supreme Court of the State of New York, in and for the County of New York. R. Sec. A, p. 35. The judgment alleged to have been obtained against the Petitioner Brownwood Manufacturing Company was in the sum of $39,897.49, and the judgment against the Petitioner Gillsam Manufacturing Company, Inc., was alleged to be in the sum of $40,562.12. R. Sec. A, p. 36. Both Petitioners filed their answer to this petition, denying the allegations generally, and further presenting to the trial court, by special exception to the allegations of Respondent's petition, the deprivation of the Petitioners' guaranteed right of due process in the exercise of the jurisdiction over them by the New York court. R. Sec. A, p. 54 and p. 67. The language of the special exception is found in Appendix B, p. B-1.

Subsequently, the Respondent filed a Motion for a Summary Judgment, pursuant to Rule 166-A, Texas Rules of Civil Procedure, attaching exemplified copies of the proceedings in the Supreme Court of New York, (R. Sec. B, p. 2) and requesting judgment by the Texas Court based upon the judgment secured in the New York Court. R. Sec. A, pp. 17-19. The Petitioners' answers to said motion again challenged the jurisdiction of the New York Court by reason of the violation of their Constitutional rights under the Fourteenth Amendment as to due process. R. Sec. A, p. 24, p. 29; Appendix B. p. B-1. The Petitioners attached affidavits of their principal officers to their answers to the Respondent's Motion for a Summary Judgment specifically denying the

authority of anyone to accept service for them in the State of New York, denying the existence of any agent in the State of New York upon which personal service could be made, and further denying that they had any opportunity to appear or prepare their defenses for the suit in New York, since they had no notice of the proceeding therein. R. Sec. A, pp. 25-27 and pp. 30-32; Appendix B, pp. B-2 to B-7. The record does not indicate that any service whatsoever was made on the New York judgment, other than service upon an attorney who formerly represented the Petitioners in New York in an arbitration proceeding. Respondent alleged that notice was given to the attorney of the Petitioners pursuant to Rule 2103(b) and Section 7506(d), New York Civil Practice Law and Rules, (R. Sec. A, p. 21) which read as alleged by said Respondent as follows:

> "*Rule 2103. Service of Papers.*
> "* * *
>
> "(b) *Upon an Attorney.* Except where otherwise prescribed by law or order of court, papers to be served upon a party in a pending action shall be served upon his attorney * * *"
>
> "*S 7506. Hearing.*
>
> "(d) *Representation by Attorney* * * * If a party is represented by an attorney, papers to be served on the party shall be served upon his attorney."

The record does not reflect any service whatsoever made upon any agent of the Petitioners nor on any agent designated by statute of the State of New York, and that the only service made in the New York proceeding was upon a

former attorney of the non-resident corporate Petitioners, who subsequently, without authority, made an appearance in said cause. Appendix B, pp. B-2 to B-7, affidavits of executive officers of Petitioners.

The trial court sustained the Respondent's Motion for a Summary Judgment based upon the validity of the judgment rendered in the State of New York, and not on any other grounds. The trial court in its judgment stated that in its opinion the judgment of the Supreme Court of the State of New York rendered on May 18, 1964, was entitled to full faith and credit under the laws of the State of Texas. R. Sec. A, pp. 80-81; Appendix B, pp. B-8 to B-9. The effect of the trial court's holding on this Motion for Summary Judgment, accepting the affidavits submitted by Petitioners as true (as it must do [see Reasons for Granting the Writ]) was that the New York judgment was valid by reason of personal service upon an unauthorized attorney for the non-resident corporate Petitioners, even though the Petitioners had no notice whatsoever of the litigation in New York until such time the proper agents of the corporations were served with citation in the State of Texas. R. Sec. A, p. 27, p. 32; Appendix B, pp. B-2 to B-7.

Petitioners perfected their appeal to the Court of Civil Appeals of the State of Texas, Fifth Supreme Judicial District, sitting at Dallas, Texas, which is the intermediate court of appeals in the State of Texas. R. Sec. A, p. 82, p. 88. The opinion of this Court (Appendix A, p. A-7 disposed

of the due process defense of the Petitioners in the following manner:

> "We do not think due process has been denied appellants (Petitioners) in this case. After voluntarily submitting themselves to the New York laws and the jurisdiction of its courts, not only by their written contracts but by invoking the jurisdiction of the very court whose judgment they now say is void, and after notice of the motion to confirm and for a judgment was served upon their attorney and they were informed of this fact and of their attorney's opposition thereto, they remained silent and let the hearing of the motion be held without further protest or objection, apparently willing to accept the benefits if the efforts of Mr. Lazarus were successful, but now say that they are not bound by the unfavorable result. This the law does not permit them to do."

It might be noted that the Court of Civil Appeals, in its opinion, ignored the disputed issues of fact concerning the authority of the attorney upon whom service was made to further represent the Petitioners, after the completion of the arbitration proceeding, in any other proceeding in New York State.

An application to the Supreme Court of Texas for a writ of error to the Court of Civil Appeals for the Fifth Supreme Judicial District at Dallas was filed by the Petitioners. R. Sec. E, pp. 1-18. Two of the Points of Error presented to the Supreme Court of Texas were:

> "POINT OF ERROR NUMBER SIX.
>
> "THE COURT OF CIVIL APPEALS ERRED IN HOLDING THAT DUE PROCESS HAD NOT BEEN DENIED PETITIONERS.

"POINT OF ERROR NUMBER SEVEN.

"THE COURT OF CIVIL APPEALS ERRED IN DENYING TO PETITIONERS THEIR RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES." (R. Sec. E, p. 8)

The Supreme Court of Texas, without written opinion, refused the same with the notation "Refused, No Reversible Error". R. Sec. E, p. 48. Petitioners' motion for rehearing was overruled. R. Sec. E, p. 48.

REASONS FOR GRANTING THE WRIT

The judgments of the courts below have further eroded the safeguards of jurisdictional due process established by this Court in the famous case of *Pennoyer v. Neff*, 95 U.S. 714, 24 L. ed. 565 (1877). The effect of the decisions below is to render a non-resident corporate defendant, who has not submitted itself to the jurisdiction of a forum, bound by a personal judgment rendered by that forum without any notice, actual or constructive, of the proceedings of the forum.

This Court has carefully defined and expanded the principles of due process guaranteed by the Fourteenth Amendment to the Constitution of the United States. In the *Pennoyer* case, *ibid*, it was established that (1) a personal judgment can not be rendered by a court without personal jurisdiction; (2) a personal judgment can not be rendered against a non-resident defendant merely because said defendant owns property within the jurisdiction of the forum; and (3) personal jurisdiction can not be obtained against a

non-resident defendant by serving process outside the forum or by publication. This Court in the years to follow has continued to adjust the concepts of the *Pennoyer* case, *ibid*, to the process of evolution experienced by our society, but has always jealously guarded the protection of due process guaranteed by the Constitution.

In *International Shoe Company v. Washington*, 326 U.S. 310, 90 L. ed. 95, 66 S. Ct. 154 (1945), the Court pronounced that "Due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" 326 U.S., 316. Even though expanding the concept of due process, the Court has continued to recognize the rights of a non-resident corporate defendant to be protected from personal judgments of a forum in which these "minimum contacts" not offensive to "traditional notions of fair play and substantial justice" did not exist. See *Hanson v. Denckla*, 357 U.S. 235, 2 L. ed. 2nd 1283, 78 S. Ct. 1228 (1958).

The lower state courts in this case at bar have allowed the lower courts of the State of New York to take a personal judgment against the Petitioners not only under circumstances beyond the boundary lines of the principle of the *International Shoe* case, *infra*, but to take one further step which this Court has inferred, but has not as yet ruled upon, would be in violation of the due process clause of the Fourteenth Amendment. This Court in *McGee v. International*

Life Insurance Company, 355 U.S. 220, 2 L. ed. 2nd 223, 78 S. Ct. 199 (1957), alluded to the fact, though no such contention was made in that case, that due process requires not only the "minimum contacts" of the *International Shoe* case, *infra*, but also adequate notice to the non-resident defendant. A personal judgment was rendered against the Petitioners, non-resident corporations of the forum in which said judgment was rendered, in spite of their contentions that they were not served pursuant to any applicable state statute nor did they have adequate notice of the suit or sufficient time to prepare their defenses and appear.

This cause was decided by the state courts under summary judgment procedure provided by Texas Rules of Civil Procedure. Rule 166-A, Texas Rules of Civil Procedure. In the consideration of the Respondent's Motion for a Summary Judgment, the Supreme Court of Texas, the state court of last resort, has held that the facts asserted by the Petitioners in opposition to that motion must be accepted as true for the purposes of the consideration of that motion. *Gulbenkian v. Penn*, 151 T. 142, 252 S.W. 2nd 929 (1953). The facts concerning the jurisdiction of the New York lower court over a non-resident corporate defendant upon which the Texas Court rendered their decision concerning due process were those stated in affidavits of the principal officers of the Petitioners. Appendix B, pp. B-2 to B-7; R. Sec. A, pp. 25-27, pp. 30-32. Briefly, these facts may be summarized as to both Petitioners, as follows: (1) they were both Texas corporations; (2) the business of their companies was confined to Texas, doing no business in New York; (3) they both agreed

to participate in a common law arbitration procedure in the State of New York with the Respondent, a New York corporation; (4) they both retained a New York attorney to represent them in the common law arbitration proceeding only; (5) they authorized the attorney to institute a special proceeding in the New York Courts to consolidate the numerous common law arbitration proceedings pending, which special proceeding was completed; (6) they engaged in the said arbitration proceeding, presented their evidence therein, and retained a counsel to represent them therein; (7) after the completion of the arbitration proceedings, both Petitioners awaited proper and due notice of proceedings to enforce the award of the arbitration commission; (8) they received no notice whatsoever of any further proceedings on said award in New York until after a final judgment was rendered against them in New York, and they were served with process of a Texas court in which Respondent had initiated action on the New York judgment; and (9) the only service made by Respondent in the New York proceeding was on the attorney previously retained at the arbitration proceeding, and Respondent did not avail itself of any other non-resident personal service, constructive service, or publication service, by statute or otherwise, to give the Petitioners notice of the New York proceedings.

The lower courts have taken the position that the Petitioners have not been denied due process because service was had upon an attorney who formerly represented them in a common law arbitration proceeding, not a statutory arbitration as provided for in the New York law. Opinion of

Court of Civil Appeals, Appendix A, pp. A-1 to A-8; Judgment of District Court, Appendix B, pp. B-8 to B-9. The authority relied upon by the Respondent to make service upon the attorney was concerned with statutory arbitration in contrast to a common law arbitration. Appendix A, p. A-4. A common law arbitration, recognized in the State of New York, *Finucon v. Board of Education,* 190 N.Y. 76, is complete when an award is made, and to that point, no judicial proceeding has been undertaken. *Lummus Company v. Commonwealth,* 297 Fed. 2nd 80, cert. denied 7 L. ed. 524 (1961). An attorney retained to handle a non-judicial arbitration is not thereby designated as an agent for service in all subsequent proceedings initiated against the non-resident corporation. This is certainly the effect of the decisions of the state courts in this matter.

The minimum satisfaction of the due process clause must be defined as requiring a non-resident corporation to have a prior notice and an opportunity for a hearing *Mullane v. Central Hanover Trust Company,* 339 U.S. 306, 94 L. ed. 865, 70 S. Ct. 652 (1950); *Grannis v. Ordean,* 234 U.S. 385, 58 L. ed. 1363, 34 S. Ct. 779 (1914). Giving notice to a past representative who has no obligation to notify the real party in interest, and who did not so notify the real party in interest, is not the type of notice which the law requires to insure an opportunity for a hearing "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo,* 380 U.S. 545, 552, 14 L. ed. 2nd 62, 66; 85 S. Ct. 1187 (1965).

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Harold B. Berman

HAROLD B. BERMAN,
EMIL CORENBLETH,
Attorneys for Petitioners.
1831 Republic National
Bank Bldg.,
Dallas, Texas, 75201,

January 23, 1967.

PROOF OF SERVICE

I, Harold B. Berman, attorney for Brownwood Manufacturing Company and Gillsam Manufacturing Company, Inc., Petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 20th day of January, 1967, I served copies of the foregoing petition for a writ of certiorari on Respondent thereto, by mailing copies in duly addressed envelopes, with first-class postage prepaid, to the following attorney of record for Respondent:

G. H. Kelsoe, Jr., Esq.
620 Mercantile Dallas Building
Dallas, Texas

The person on whom service is to be made does not reside five hundred miles or more from me.

Harold B. Berman

Harold B. Berman,
Attorney for Petitioners.
1831 Republic National
Bank Bldg.,
Dallas, Texas, 75201,